

STORM KING COAL MINING CO.

IBLA 87-147

Decided October 26, 1988

Appeal from a decision of the Montana State Office, Bureau of Land Management, denying request for approval of assignment of record title interest in coal lease. Montana 052647.

Affirmed.

1. Coal Leases and Permits: Leases

BLM properly denies a request for approval of an assignment of the record title interest in a coal lease where the lease account is not in good standing with respect to the payment of annual rental and production royalty, and the assignee has not presented evidence sufficient to rebut that conclusion.

APPEARANCES: L.R. Bretz, Billings, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Storm King Coal Mining Company (Storm King) has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated October 21, 1986, denying its March 7, 1984, request for approval of the assignment of the record title interest in coal lease Montana 052647 from the Divide Coal Mining Company (Divide) to Storm King.

The record indicates that on October 2, 1962, BLM issued coal lease Montana 052647 to Divide, pursuant to section 2(a) and (b) of the Mineral Leasing Act, as amended, 30 U.S.C. | 201 (1958). 1/ The lease was effective November 1, 1962, and covered 80 acres of land in which the United States owns the coal, situated in the W\ SW^ sec. 24, T. 6 N., R. 26 E., principal meridian, Musselshell County, Montana. It required the lessee to pay rental and royalty in certain amounts and reserved to BLM the

right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

1/ The record indicates that Divide was a partnership organized by Victor C. Carlson and Jack H. Carlson pursuant to an agreement dated June 25, 1962.

Following issuance of the lease, the record further indicates that Divide mined coal from the subject land first by underground and then by surface methods without serious incident. By notice dated June 8, 1982, BLM notified Divide that the terms and conditions of its coal lease would be readjusted effective November 1, 1982, at the conclusion of the initial 20-year period of the lease, and provided Divide with a copy of those readjusted terms and conditions. Under the readjusted lease, the per acre rental was increased from \$1 to \$3, payable annually in advance on or before the lease anniversary date, and the royalty was increased from 15 cents per ton to 12-1/2 and 8 percent of the value of the coal produced, respectively, by surface and underground mining methods, payable on the final day of the month succeeding the month in which the coal is sold. In addition, the readjusted lease provided that rental could no longer be credited against royalties. In its June 1982 notice, BLM stated that Divide had the option of filing objections to the readjusted terms and conditions or relinquishing the lease within 60 days from receipt of the notice. BLM subsequently extended the time for filing objections.

On November 1, 1982, Divide filed timely objections to the proposed readjustment of its coal lease, in particular challenging the requirement to pay rental and the increase in the royalty rate. By decision dated December 8, 1982, BLM dismissed Divide's protest of the proposed readjustment and stated that the readjustment was effective "as of November 1, 1982." Divide was served with a copy of BLM's decision on December 13, 1982. There is no indication that Divide filed any appeal from that decision.

On April 12, 1983, Storm King filed with BLM an April 4, 1983, assignment of all operating rights in the subject lease from Divide to Associated Western States Energy Ventures (Associated Western) and an April 4, 1983, assignment of all of these same operating rights from Associated Western to Storm King, and requests for approval of these assignments. By notice dated August 10, 1983, BLM informed Divide, Associated Western, and Storm King that it could not take any further action on the requests for approval of the assignments of operating rights until certain items were resolved. In particular, BLM stated that the subject lease was "not in good standing" because royalty on coal produced after the effective date of the readjustment had been "paid at the old rate of \$.15 per ton when it should have been paid at the new rate of 12-1/2 percent of the selling price at the mine." On August 25, 1983, Storm King responded to BLM's charge of unpaid royalty, stating that Divide did not owe any royalty because "[i]t is our understanding that the Divide mine did not mine any coal after November 1, 1982." In response thereto, the Chief, Royalty Accounting Branch, Minerals Management Service (MMS), in an October 12, 1983, letter to Storm King, stated that royalties were due on 1,280 tons of coal produced and sold in November 1982, as reported by Storm King, and that if no coal was in fact produced or sold, Storm King should submit an amended report.

During the pendency of the request for approval of the assignments of operating rights, the record indicates attempts by MMS to collect the unpaid royalty and rent.

On March 7, 1984, BLM received a March 5, 1984, assignment of 100 percent of the record title interest in the subject coal lease from Divide to Storm King, along with a request by Storm King for approval of the assignment. By memorandum dated April 2, 1984, the Acting Chief, Branch of Solid Minerals, BLM, requested the Acting Chief, Solid Minerals Unit, MMS, to advise whether the account of the subject lease was "in good standing." The Chief, Royalty Accounting Branch, responded by memorandum dated April 27, 1984, stating that Divide had "submitted all late payments," but noted that Storm King, "operator" of the lease, had "not submitted a production report since September 1983," and requested assistance in bringing Storm King "into compliance with reporting procedures." Thereafter, by letter dated May 10, 1984, the Acting Chief, Branch of Solid Minerals, informed Storm King that "no further action to approve the assignment from Divide Coal Mine to Storm King will be taken until the production reports are submitted and the lease account is in good standing."

By memorandum dated June 21, 1984, the Chief, Mining Regulation Section, BLM, requested the Chief, Royalty Compliance Division, MMS, to advise whether the account of the subject lease was "in good standing," noting that a lease assignment could not be processed without such information. The Chief, Mining Regulation Section, stated that BLM had determined from reports filed with the State that approximately 13,000 tons of coal had been produced from September 1983 through May 1984. By memorandum dated August 14, 1984, the Regional Manager, Lakewood Regional Compliance Office, MMS, reported to the Chief, Mining Regulation Section, that 2,244 tons of coal had been mined by surface methods under the subject lease in fiscal year 1983. By letter dated October 1, 1984, the Chief, Royalty Accounting Branch, required Storm King to immediately submit all applicable 1984 production and royalty reports, noting that Storm King was "seriously delinquent in both reporting and payment of royalty due." Prior to receipt of any 1984 reports, the Chief, Royalty Accounting Branch, by letter dated November 5, 1984, required Storm King to pay within 30 days, \$10,790.74 in royalties due on coal produced from August to December 1983. 2/

By letter dated April 12, 1985, MMS notified Divide that a total of \$59,512.68 in rental and royalties was due for the period of August 1983 through December 1984, and required payment within 30 days. 3/ By notices dated May 21 and June 20, 1985, MMS reminded Divide of the unpaid rental and royalty. Copies of these notices were provided to BLM on August 5, 1985.

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2/ The royalties due reflected royalties owed (\$16,950.43) on coal produced less payments already made by Storm King (\$6,159.69).

3/ A statement attached to the April 1985 MMS letter indicated that Divide owed \$240 in rental originally due on Nov. 1, 1984, and \$59,272.68 in royalties due on coal produced from August 1983 through December 1984, taking into account royalty payments already made. MMS stated that it had not included royalties due for 1985 because Storm King "has failed to file any 1985 reports."

In addition to MMS' attempts to secure payment of royalties and rentals due, the record indicates that there was a dispute between MMS and Storm King over the proper valuation of coal produced from the subject land. By letter dated July 31, 1984, the Chief, Royalty Valuation and Standards Division, MMS, concluded that Storm King had improperly valued coal. Storm King appealed the July 1984 letter to the Director, MMS (docketed as MMS-84-0032-MIN). By letter dated November 28, 1984, the Chief, Royalty Valuation and Standards Division, concluded that Storm King had failed to properly document washing and transportation expenses deducted from the sales prices of coal produced from August through December 1983 in determining the value of coal for royalty computation purposes. The letter required Storm King to submit proper documentation and recompute royalties due for that period. Storm King also appealed the November 1984 letter to the Director, MMS (docketed as MMS-85-0010-MIN).

On October 16, 1986, the Director, MMS, issued a final decision with respect to both of Storm King's appeals, affirming the July and November 1984 letters of the Chief, Royalty Valuation and Standards Division. The Director also noted that Storm King had contended that it had never received proper notice of the November 1, 1982, royalty rate readjustment but concluded that any dispute concerning that rate was properly lodged with BLM, not MMS. Pursuant to a request, the Board has obtained from MMS the casefiles in connection with Storm King's two appeals (MMS-84-0032-MIN and MMS-85-0010-MIN). These files indicate that no appeal was ever filed from the Director's October 1986 decision. Nor do the Board's records reflect the filing of an appeal.

Finally, in its October 21, 1986, decision, BLM denied Storm King's request for approval of the assignment of the record title interest in coal lease Montana 052647 from Divide to Storm King "because the lease account is not in good standing." BLM explained that: "Divide Coal Mining Company has been repeatedly advised of the delinquency in the payment of rental and royalty, but as of this date [MMS] has not received payment." Storm King has appealed from this October 1986 BLM decision.

[1] Appellant does not challenge BLM's authority to deny a request for approval of an assignment of the record title interest in an outstanding coal lease where the lease is "not in good standing" because the lessee has failed to pay timely rentals and royalties due. Indeed, section 30 of the Mineral Leasing Act, as amended, 30 U.S.C. | 187 (1982), provides that no coal lease may be assigned "except with the consent of the Secretary of the Interior." Moreover, under Departmental regulations implementing that statutory provision, BLM is specifically required to deny approval of an assignment of the record title interest in a coal lease if the lease account is not in good standing and that defect is not cured within the time established by BLM in a decision notifying the party requesting approval why the assignment cannot be approved. See 43 CFR 3453.3-2 and 3453.3-1(a)(6). In the present case, in addition to the various notices from MMS to pay unpaid rental and royalty, the Acting Chief, Branch of Solid Minerals, in a May 10, 1984, letter to Storm King, stated that "no further action to approve the assignment from Divide Coal Mine to Storm King will be taken until \* \* \* the

lease account is in good standing." Accordingly, upon appellant's subsequent failure to bring the lease account into good standing, BLM could properly deny approval of the assignment of the record title interest to Storm King in its October 1986 decision.

Appellant, however, disputes BLM's conclusion that the subject lease is not in good standing. Appellant contends: "The matter of royalty and rental is now on Appeal before the Agency and no decision has as yet been made on same. There is no final determination of delinquency as a matter of public administrative record. \* \* \* Assignee has taken the position that there [are] no delinquent payments owed." 4/ Appellant apparently believed at the time of BLM's October 1986 decision that no final determination had been made with respect to its pending appeals to the Director, MMS, from two decisions of the Chief, Royalty Valuation and Standards Division. However, at the time the BLM decision was rendered, the Director had issued his final decision on those two appeals, and no appeal to the Board was subsequently filed. Further, regardless of whether a final decision by the Director had been issued at the time appellant filed its appeal herein, that case involved questions regarding the proper valuation of the coal produced from the subject land and not the proper royalty or rental rate. The royalty rate had been established by BLM at the time of the November 1, 1982, readjustment which was protested but never appealed and had never been reduced pursuant to applicable Departmental procedures. 5/ In addition, the

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4/ Appellant's reasons for appeal are expressed in its notice of appeal. In addition, the record contains an "Appeal Rationale" filed by appellant. However, this document states that it relates to an appeal of an Oct. 16, 1986, MMS decision filed Nov. 26, 1986. We presume that the decision referred to is the October 1986 decision of the Director, MMS. However, as noted supra, there is no record of an appeal being filed from that decision. In any case, the document adds nothing to appellant's reasons for appealing the October 1986 BLM decision involved herein. The document refers to a Dec. 13, 1984, affidavit of L. R. Bretz, which indicates that Storm King was not aware that the coal lease had been readjusted effective Nov. 1, 1982, until receipt of BLM's Aug. 10, 1983, notice. Nevertheless, the record supports the conclusion that appellant had numerous opportunities thereafter to place the lease in good standing in accordance with the readjusted rental and royalty rates, and failed to do so.

5/ Under section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. | 209 (1982), and its implementing regulations, 43 CFR 3485.2(c), BLM, and formerly MMS, had authority to reduce royalty in accordance with procedures outlined in the regulations. See also 43 CFR 3473.3-2(d); Peabody Coal Co., 93 IBLA 317, 93 I.D. 394 (1986). There is no evidence that appellant or Divide ever applied for a reduction in the royalty rate, other than appellant's December 1984 request for a retroactive reduction and its January 1985 settlement proposal. There is simply no statutory or regulatory authorization for a retroactive reduction. Nor has appellant filed a proper request with BLM. See 43 CFR 3485.2(c)(2); Mountain States Resources Corp., 92 IBLA 184, 194, 93 I.D. 239, 245 (1986). In any case, the lease account was seriously delinquent with respect to the payment of rental and royalty well prior to any request for a royalty rate reduction, and there is no evidence that delinquency has been cured.

rental rate had been readjusted by BLM effective November 1, 1982, and protested but never appealed. 6/ The Director had no authority, as he noted in his October 1986 decision, to affect the royalty, or in fact the rental rate. Those rates were set by BLM at the time of readjustment. Also, after December 3, 1982, MMS no longer had authority to act on requests for the reduction of royalty or rental rates. See 48 FR 8982-83 (Mar. 2, 1983); 48 FR 41589 (Sept. 16, 1983).

Moreover, according to the record before the Board, the question of whether the lessee was delinquent in paying in accordance with the applicable rental and royalty rates was not before the Director or the subject of any pending appeal within the Department at the time appellant appealed herein. Rather, a determination that the lessee was delinquent in the payment of rental and royalty was made by MMS at various times, the last notice of such delinquency occurring in a June 20, 1985, letter to Divide. There is no evidence that appellant or Divide had paid the unpaid rental and royalty at the time of the October 1986 BLM decision. Nor has appellant provided any evidence of payment. 7/ Accordingly, we conclude that BLM properly determined that the lease account was "not in good standing" at the time of its October 1986 decision and properly denied appellant's March 1984 request for approval of the assignment of the record title interest in coal lease Montana 052647 from Divide to Storm King. See Walter Scott, A-28148 (Dec. 16, 1960).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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John H. Kelly  
Administrative Judge

I concur:

Anita Vogt  
Administrative Judge  
Alternate Member

6/ Even had appellant or Divide appealed BLM's decision to readjust the royalty and rental rates at the expiration of the initial 20-year period of the subject lease, the Board and the courts have consistently affirmed such readjustment in these circumstances. See, e.g., Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987); FMC Wyoming Corp. v. Hodel, 816 F.2d 496 (10th Cir. 1987), cert. denied, 108 S. Ct. 772 (1988); Ark Land Co., 97 IBLA 241 (1987), appeal filed, Ark Land Co. v. Hodel, (No. 87-254-K (D. Wyo.)).

7/ It is apparently appellant's position that there is no "delinquency" because it is or ultimately will not be required to pay rental and royalty in accordance with the readjusted rates. Accordingly, appellant has apparently paid in accordance with the original rates. See Letter to the President, dated Dec. 4, 1984, at 2. There is no basis, however, for appellant's position.